

8 Official Opinions of the Compliance Board 89 (2012)

- ◆ Administrative Function
 - ◇ Within exclusion, discussion of:
 - selection of members to attend a function
 - administration of existing expense policy
 - review of line items in existing budget when future policy not discussed
 - interpersonal relations among commissioners
 - department heads' communications with members, to the extent that discussion did not involve policy issues
 - ◆ Notice Requirements
 - ◇ Content
 - notice of closed meeting must specify that the vote to close will be held in open session
 - notice must specify location of meeting
 - notice of meeting to perform functions within the Act should be updated when public body instead decides to meet only to perform administrative functions
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July 5, 2012

Re: Carroll County Commissioners (Cornelius Ridgely)

We have considered the complaint of Cornelius M. Ridgely (“Complainant”) that the County Commissioners of Carroll County (“the Commissioners”) violated the Open Meetings Act (“the Act”) by discussing public business during a “retreat” on January 13, 2012. As set forth below, we find that the Commissioners did not violate the Act with respect to some aspects of that meeting, that we cannot reach a conclusion on others, and that the notice given was deficient.

Facts and allegations

Complainant states that the County published on its website a weekly agenda listing a closed meeting to be held on January 13, 2012 at 8:00 a.m. The agenda states:

Friday ~ January 13, 2012

8:00 a.m. Closed ~ Administrative Session

Personnel

Land Acquisition

Legal Advice

Complainant states that the weekly agendas generally reflect the location of meetings held away from the County offices and that the January 13 entry did not specify such a location. Four of the five Commissioners produced their calendars to Complainant in response to his request for documents under the Public Information Act. Those calendars contain entries for a Commissioners' meeting on January 13 at the County's Bear Branch Nature Center. Complainant also obtained copies of a park caterer's receipt for payment from the Carroll County Commissioners for catering services for five people on January 13; the meeting room calendar for the Bear Branch Nature Center showing a commissioners' meeting for that date; and the calendar of the County Chief of Staff, which reflected an all-day retreat of the Commissioners at that location. From these facts, it appeared to Complainant that the Commissioners met to discuss public business within the Act without disclosing the true location of the meeting, without voting in open session to close a meeting before excluding the public, and without keeping the proper minutes. In short, it appeared to Complainant that the Commissioners had met secretly and had violated the Act in several ways.

The County Attorney provided a response for the Commissioners "based on their recollection of the event." The response states that the Commissioners indeed gathered as a group on January 13 at the county park, that only the Commissioners attended the gathering, or "retreat," and that they discussed seven categories of topics which they "believe . . . qualify as administrative, housekeeping, and/or managerial matters which are not subject to the Open Meetings Law." The County Attorney states that, before the event, he had provided the President of the Commissioners "with advice concerning the boundaries of the Open Meetings Law and permissible subject matter for the retreat." The topics listed in the response are not easily reconciled with two of the topics listed on the posted agenda: the County Attorney did not attend, so the commissioners did not seem to receive "legal advice," and the Commissioners did not specify "land acquisition" as one of the topics discussed.

Discussion

The allegations and response primarily raise the questions of whether the topics discussed by the Commissioners fell within a function

covered by the Act and whether the notice posted on the website violated the Act.

We begin with the question of whether the seven topics discussed fell within the Act. If they fell within the Commissioners' "administrative function," the Act did not apply to this gathering, which was not held in conjunction with an open session. *See* State Government Article ("SG") §§ 10-502(b) and 10-503(a).¹ The Act also did not apply to any topic not considered "public business." *See* SG § § 10-502(g) and 10-505 (defining "meet" as the convening of a quorum for the consideration or transaction of public business; requiring public bodies to "meet in open session" unless the Act expressly provides otherwise).

Three of the seven topics fall easily into the administrative function as we have applied it: "the selection of a Commissioner to attend a breakfast" (*see* 7 *OMCB Opinions* 269 (2011), involving a discussion of which council member would attend an event); "the administration of the County's current expense policy" (*see* 1 *OMCB Opinions* 166 (1996), involving the administration of an existing leave policy, "as distinguished from a discussion of how the leave policy might be changed"); and "the current procedure for issuing press releases . . ." (*see id.*; *see also* 1 *OMCB Opinions* 133 (1995), involving discussions about press releases).

The next two topics fall instead into a gray area. One topic involved the "performance and operations of several appointed directors of departments," a topic the County Attorney has described to our counsel as "refer[ring] to those directors' interactions with [the Commissioners] and other Cabinet members, the frequency of the meetings between the subject directors and [the Commissioners], and the directors' handling of tasks previously assigned" The other topic involved "[c]ommunications with the Cabinet and the scheduling of future meetings with Cabinet members." Both topics perhaps fell within the Commissioners' function as the "executive head" of the county government. *See* 1 *OMCB Opinions* 261 (1997) (stating that county commissioners' meeting with cabinet heads in the exercise of the commissioners' administrative powers was not subject to the Act). However, the line between the performance of merely administrative tasks and the formulation of policy is easily crossed. In 3 *OMCB Opinions* 227 (2002), a city council discussed in closed session whether to make the city administrator "the reporting point for department heads and not the various [c]ommissioners." *Id.* at 228. The council also discussed "specifically identifiable employees . . . and how they would be

¹ We explained the principles applicable to the administrative function exclusion in 7 *OMCB Opinions* 225, 230-233 (2011) and 3 *OMCB Opinions* 105 (2001), both of which involved complaints concerning this public body, and so we need not repeat them here.

impacted by a proposed reorganization of the internal operation of the municipal government.” We concluded that the discussion exceeded the limits of the administrative function exclusion: “The Council’s consideration of alternative scenarios that would define the relationship between the Council and City Administrator were policy deliberations fundamental to the City’s governance, rather than simply putting into place the details of a policy already reflected in current law.” *Id.* at 230. In 5 *OMCB Opinions* 76 (2006), we concluded that a town council’s discussions about the handling of pay adjustments and the mayor’s role in that process exceeded the limits of the administrative function exclusion. In 6 *OMCB Opinions* 180 (2009), we concluded that the commissioners’ discussion of a departmental consolidation plan exceeded the exclusion. We explained, “to qualify as an ‘administrative function,’ the matter under discussion must involve the administration of an existing law, rule or policy . . . [as opposed to] the development of a new policy.” *Id.* at 184. And, in 3 *OMCB Opinions* 105 (2001), we found that the Carroll County Commissioners’ consideration of an “across-the-board” communication policy was not an administrative function. In so doing, we rejected the County’s argument that the formation of policies “pertain[ing] to only internal operations” was an executive, or administrative, function. *Id.* at 111-12.

Scheduling discussions, also, may easily stray beyond the merely administrative, as when a body decides to place an item on the agenda. *See* 7 *OMCB Opinions* 148, 164 (2011) (under the Act, discussions embodying decision that a particular issue required a legislative response were to be held in open); *see also* 2 *OMCB Opinions* 5, 7 (1998) (social gatherings not to be used “as a device to script discussion at the following meeting [or] set the agenda for discussion”). From the information the Commissioners provided via the County Attorney on these two topics, we cannot reach a conclusion on whether the Commissioners’ discussions about future meetings and communications with department heads pertained only to matters within the Commissioners’ administrative functions.

A sixth topic was “[t]he administration of several line items in the County budget,” a topic the County Attorney has described as including two items: “a review of the current line item for legal expenses,” and “a review and discussion about the County’s current salary structure.” The County Attorney further states, “No changes were proposed to these as this was merely a preparatory review for the upcoming County budget process.” In light of that proviso, these subjects fell into the administrative function exclusion. *See, e.g.,* 3 *OMCB Opinions* 74 (2001) (finding that budget preparation sessions fell within the exclusion). Otherwise, a discussion about a “line item” or “salary structure” can easily stray into matters of policy, as discussed above.

The last topic -- “interpersonal communications between the Commissioners” – did not appear to have been “public business” within the Act. If that discussion merely involved “the betterment of interpersonal relationships” and “did not include reference to any business matters which would come before [the Board],” *see* 3 *OMCB Opinions* 274, 276 (2003), that aspect of the gathering was not subject to the Act. *See also* 3 *OMCB Opinions* 122, 124 (2001) (Act violated when the public body discussed matters pertaining to future policy decisions at a retreat “designed primarily to improve interpersonal relations”).

As we are unable to reach the conclusion that the meeting involved administrative matters beyond the scope of the Act, we address the notice posted on the County’s website.

The notice posted on the County’s website was defective in two regards. First, it announced that a “closed meeting” on two specific items of public business would be held, but it did not give notice of an open meeting at which the Commissioners would vote to hold the closed session. *See* SG § 10-508(d)(1) (providing that a public body may not meet in closed session “[u]nless a majority of the members . . . present and voting vote in favor of closing the session . . .”); *see also* 8 *OMCB Opinions* 46, 48-50 (2012) (available at <http://www.oag.state.md.us/Opinions/Open2012/8omcb46.pdf>) (explaining the need to hold a public vote to close a meeting). The notice thus conveyed to anyone taking it at face value that the meeting would be closed in violation of the Act. The notice was also deficient because it omitted the location of the meeting. *See* SG § 10-506(b)(2) (notice to specify “date, time, and place of the session”). If the Commissioners’ discussion indeed strayed into legislative or quasi-legislative matters, as might easily have occurred in the absence of staff or counsel, they violated the Act’s requirements that the public be given accurate notice and the opportunity to observe the public body’s vote to meet behind closed doors, to object to the decision, to inspect the presiding officer’s written statement of the basis for the closing, and to read a summary of the topics discussed and actions taken. *See* SG § § 10-508(d) and 10-509 (c). If the meeting was not subject to the Act, the notice should have been revised to reflect the cancellation. *See* 1 *OMCB Opinions* 183, 189 (1996) (stating that the Act implicitly requires that the public be notified of changes to notices given under the Act).

Conclusion

We conclude that the notice given by the Commissioners of a meeting on January 13, 2012 was deficient and that we cannot ascertain whether, in the actual event, the Commissioners performed functions subject to the Act’s mandate that the business of the public be conducted in

public. We note the appearance of secrecy given by the Commissioners' decision to meet in an undisclosed location, without staff, and on a day originally scheduled for a meeting for the discussion of business within the Act. That appearance might have been avoided by measures such as a prompt correction of the inaccurate notice, disclosure of this session in the same way used for the Commissioners' other administrative sessions, and, given the ease with which a discussion can move from administrative matters into policy matters, the presence of staff. *See 6 OMCB Opinions 63, 67, n.3 (2008)* (stating, "Although a facilitator is not required at a retreat, a third party familiar with the [Act] could clearly serve as an appropriate check in ensuring conversation did not drift to areas to which the Act would apply.").

Open Meetings Compliance Board

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